No. 3515

In the United States Circuit Court of Appeals For the Ninth Circuit.

MARTIN TROGLIA,

Plaintiff in Error,

vs.

THE BUTTE & SUPERIOR MINING COMPANY, a Corporation,

Defendant in Error.

Brief of Defendant in Error.

WALKER & WALKER and
C. S. WAGNER,
Attorneys for Plaintiff in Error.

KREMER, SANDERS & KREMER,
Attorneys for Defendant in Error,
O'Rourke Estate Building,
Butte, Montana.

McKEE PRINTING CO., BUTTE, MONT.

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STATEMENT OF THE CASE.

The statement of the case on behalf of plaintiff in error consists of a review of the allegations of the complaint rather than one of the testimony. In view of the fact that the record is brief and the conditions surrounding the scene of the unfortunate accident may readily be understood we deem it unnecessary to point out in detail wherein the statement of opposing counsel is inadequate, but it is proper to invite the attention of the court to a few important facts.

The deceased minor was 11 years of age at the time of his death (R., p. 29). All of the witnesses agree

that he was a bright youth, strong, athletic and physically above the average boy of his age; that he could read and was a good swimmer (R., pp. 84, 96. 45, 54, 63, 55, 83, 96). It further appears from the record that he had been swimming in the pond before the drowning for a couple of hours, going in for ten or fifteen minutes at a time (R., p. 55). He was considered one of the strong boys in school (R., p. 63). One of his playmates testified that he was a fancy swimmer and he was fond of seeing how long he could stay under water (R., p. 65).

The record further discloses that there were four or five signs in and on the banks of the pond reading variously: "NO TRESPASSING," "10 FEET DEEP—KEEP OFF," "DANGER—10 FEET DEEP," "10 FEET DEEP—KEEP OUT—DANGER" (R., pp. 53, 62, 73, 82). All of the boys knew the signs were there (R., p. 54).

The water was "kind of warm" at the time of the accident (R., p. 74), although the complaint alleges as part of the failure of duty of the defendant in error that it was its legal duty to warn plaintiff's minor son of the dangers attendant on going in swimming in the deep *and cold* waters (R., p. 8), and that the waters were cold, chilly and of low temperature—40 or 50 degrees, etc. (R., p. 7).

The record further discloses the fact that the pond in question was remote from the home of the deceased and from the school which he attended. The pond was about a mile from Meaderville, where deceased lived, and over a mile from the school in the Mc-

Queen Addition, where he went to school. In order to go to the pond from either Meaderville or the school it was necessary for this boy to walk away from Meaderville and from the McQueen Addition over a mile before he could reach the pond at all. It was not along the way that the boys usually traveled in going to or coming from school or in going home. "It was away out of the way" (R., p. 99).

It is further disclosed by the record in the case that the pond in question was not near a road that was habitually or at all travelled by the deceased or the other boys. It appears that there was a road nearby that led to two mines—the Butte & Bacorn and the Butte and Superior, and also to a ranch (R., p. 36). The use of this road was confined to comparatively few persons. The ranchman used it and the boss or superintendent of the Butte & Bacorn travelled over it in his automobile. In 1918 this road was not travelled very much (R., p. 62). There is other evidence that it was used by automobiles and wagons and by a few persons living in houses in the neighborhood (R., pp. 35, 50, 60, 61, 62, 72, 79, 99). There is absolutely no evidence in the case to substantiate the assertion of opposing counsel "that many children passed to and fro including the minor son of plaintiff and his youthful companions and playmates." (Brief of plaintiff in error, p. 3.)

Without unduly prolonging this statement, we submit the record in conjunction with the sketch of the pond which was introduced in evidence at the trial.

ARGUMENT.

It will serve no useful purpose to attempt to explain or reconcile the decisions of the courts in an effort accurately to define the legal status of the deceased at and immediately prior to his death with respect to whether he was technically a trespasser, a licensee or was present in the pond by invitation, express or implied. The weight of opinion is to the effect that the general rule that an owner of premises is under no legal obligation to trespassers or licensees to keep them in proper condition applies with equal force to children and adults. Those courts challenging the application of this general rule in cases involving children of tender years base their argument upon various grounds—the element of "attractive dangers" and knowledge, actual or implied, of the presence of the child, its tender years which constitute justification in departing from the rule in question, and other grounds. Some adopt the exception to the general rule on the ground of "implied intention" on the part of the owner. Some say that the exception is but an application of the maxim "sic utere, etc." Other courts base their reasoning on the ground of "implied invitation," while still others assert simply that the rule is an exception to the general rule born of necessity and adopted in the interest of humanity. An interesting review and criticism of the cases and the reasoning in support thereof are found in Bottum's Adm'r v. Hawkes, 79 Atl., 858 (Vt.).

This court, of course, is familiar with the origin

of the doctrine of "attractive nuisances." It was first announced in *Lynch* v. *Nurdin,* 41 E. C. L., 422; 1 Q. B. 29, 10 Am. Neg. Cases, 77 N. In this country it was first applied in the case of *Sioux City & Pacific Ry. Co.* v. *Stout,* 17 Wall (U. S.), 675, and later approved by the Supreme Court of the United States in *Union Pacific Ry. Co.* v. *McDonald,* 152 U. S., 262. All modern decisions agree that in recent years there has been and is now strong inclination on the part of all courts to restrict the rule rather than to extend it or to repudiate it altogether; and the Supreme Court of the State of Montana has unqualifiedly followed the trend of the courts in strictly limiting the scope of its application.

A REVIEW OF THE MONTANA DECISIONS.

In *Driscoll* v. *Clark,* 32 Mont., 172, it is said:

> "There seems, however, to be a growing tendency in the later cases to strictly limit the doctrine to cases falling within the facts disclosed by Railroad Co. v. Stout, or to renounce the doctrine altogether. (p. 181).
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> * * * * * * *
>
> "It has been contended broadly that when an owner places or permits anything upon his property which is attractive to others, the invitation may be inferred as a fact by the court or jury. Now, since it is manifest that to some classes of persons, such as infants, the things ordinarily in existence and use throughout the country, such as rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks, etc., are both attractive and

dangerous, it is clear that the adoption of such a broad contention would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon the owners such a burden of vigilance and care as to materially impair the value of property and seriously cripple the business interests of the country. Therefore, it has been generally held that the invitation cannot be inferred in such cases. These cases rest upon the sound principle that, where the owner makes such use of his property as others ordinarily do throughout the country, there is not, in legal contemplation, any evidence from which a court or jury may find that he had invited the party injured thereon, though it be conceded that his property or something thereon was calculated to and did attract him. * * *

"The writer of this opinion does not hesitate to say that, in his judgment, the doctrine of the 'turntable cases' is against the weight of authority, and cannot be sustained upon principle or reason. See the following cases: Delaware etc. R. Co. v. Reich, 61 N. J. L., 635, 68 Am. St. Rep., 727, 40 Atl., 682, 41 L. R. A., 831; Turess v. New York etc. R., 61 N. J. L., 314, 40 Atl., 614; Walsh v. Fitchburg R. Co., 145 N. Y., 301, 45 Am. St. Rep., 615, 39 N. E., 1068, 27 L. R. A., 724; Daniels v. New York etc. R. Co., 154 Mass., 349, 26 Am. St. Rep., 253, 28 N. E., 283, 13 L. R. A., 248; Frost v. Eastern R. R., 64 N. H., 220, 10 Am. St. Rep., 396, 9 Atl., 790; Ryan v. Towar, 128 Mich., 463, 92 Am. St. Rep., 481, 87 N. W., 644, 55 L. R. A., 310; Uthermohlen v. Bogg's Run Co., 50 W. Va., 457, 88 Am. St. Rep., 884,

40 S. E., 410, 55 L. R. A., 911; Paolino v. McKendall, 24 R. I., 432, 96 Am. St. Rep., 736, 53 Atl., 268, 60 L. R. A., 133."

In the case of *Gates* v. *Northern Pacific Ry. Co.*, 37 Mont., 103, wherein it was sought to apply the doctrine of "attractive nuisances" to a worn out car, bottom side up on the sloping side of a railroad embankment in such a way as to fall upon and kill a child eleven years old, the court adhered to its earlier announced tendency and laid down the rule that to bring an action based on the doctrine of the "turntable cases" it was necessary for plaintiff to allege and prove not only that the car was especially attractive to children, but also, *that the child was too young to appreciate the danger, etc.* From a judgment for plaintiff defendant appealed and the Supreme Court of Montana, in reversing the lower court, said:

"A peculiar situation appears from the record. Plaintiff relied upon the fact that the deceased was a child of such tender years that he was attracted to the car by its 'queer' appearance, and was therefore not technically a trespasser, and that he was unable to appreciate and understand the danger attendant upon the conditions surrounding him; yet the fact that he was so immature as to bring him within the rule of the *Stout Case* was neither alleged nor proved, and the court gave the jury an instruction on contributory negligence. The plaintiff testified that Amos, who was eleven years of age, was an active, robust boy, able to earn money. In the case of *Buch* v.

Amory Mfg. Co., 69 N. H., 257, 76 Am. St. Rep., 163, 44 Atl., 809, the court said: 'The plaintiff was an infant of eight years. The particular circumstances of the accident—how or in what manner it happened that the plaintiff caught his hand in the gearing—are not disclosed by the case. It does not appear that any evidence was offered tending to show that he was incapable of knowing the danger from putting his hand in contact with the gearing, or of exercising a measure of care sufficient to avoid the danger. Such an incapacity cannot be presumed. * * * An infant is bound to use the reason he possesses and to exercise the degree of care and caution of which he is capable. If the plaintiff could by the due exercise of his intellectual and physical powers have avoided the injury, he is no more entitled to recover than an adult would be under the same circumstances.'

"In view of the fact that the deceased was *prima facie* a trespasser, the burden rested upon the plaintiff to allege and prove facts that would remove that objection to a recovery, and bring the case within the principles laid down in the *Stout Case*. I do not mean to say—because the question is not before us—that a child so young that his trespass in pursuit of an especially attractive object might be excused, could not be guilty of contributory negligence. What I do say is that, where the trespasser is excusable on account of the tender years of the child, the fact should be alleged and some proof offered in support of it, unless the child is so very young that there can be no question of his lack of capacity."

In this last Montana decision the deceased minor was of the same age as John Troglia—11 years. The solitary fact of his age appears in the record but there is not a scintilla of evidence tending remotely to prove the essential ingredient that he was "too young to appreciate the danger" of going into the pond, rather the evidence is all the other way.

The Gates Case not only affirmed the earlier Driscoll-Clark case in limiting the application of the doctrine of the "turntable cases," but went further, as noted, in laying down the rule that it must not only be alleged, but established by evidence that the infant was too young to appreciate the danger.

In *Nixon* v. *Montana, etc. Ry. Co.,* 50 Mont., 95, the Supreme Court of Montana says:

> "The extent to which the 'turntable' doctrine has been accepted in this state and how it may be invoked are disclosed in Driscoll v. Clark, 32 Mont., 172, and in Gates v. Northern Pacific Ry. Co., 37 Mont., 103. * * *
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> "As elucidating some of the circumstances to which this doctrine *cannot be applied* we incorporated in the Driscoll case certain expressions of the Supreme Court of Texas in *San Antonio, etc. Ry. Co.* v. *Morgan,* 92 Tex., 98, 46 S. W., 28, including the following: 'It has been contended broadly that when an owner places * * * anything upon his property which is attractive to others and *one is thereby induced to go thereon,* the invitation may be inferred as a fact by the court or jury. Now, since it is manifest that to some classes of persons, such as infants, the

> things ordinarily in existence and use throughout the country, such as rivers, creeks, *ponds,* wagons, axes, plows, woodpiles, haystacks,' etc., are both attractive and dangerous, it is clear that the adoption of such a broad contention would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon the owners such a burden of vigilance and care as to materially impair the value of property and seriously cripple the business interests of the country. Therefore it has been generally held that the invitation cannot be inferred in such cases.' "

Herefrom it will be noted that the Supreme Court of the State of Montana, in adopting the views of the Supreme Court of Texas, with respect to the inapplicability of this doctrine to ponds has specifically held that in Montana this doctrine finds no application in the case of a pond or reservoir.

The next Montana case is that of *Fusselman* v. *Yellowstone Valley, etc. Co.,* 53 Mont., 254, which, when examined, does not in any way suggest any departure by the Supreme Court of this state from the rule laid down in the Driscoll-Clark case, for in the Fusselman case it appears that the judgment of the lower court in favor of the defendant was affirmed solely because of the insufficiency of the evidence with respect to where and the circumstances under which the death occurred and the consequent failure to establish actionable negligence by substantial proof. However, we invite the attention of the court to the rule announced in the Fusselman case, as follows:

> "To state a cause of action under the doctrine of the turntable cases it is not enough for the complaint to show that the premises were attractive to children, or that children generally were attracted thereto, but it must show that the attraction lured the injured child there with the result complained of, the facts pleaded disclosing the causal connection between the negligent act and the injury."

A search of the record fails to disclose that John Troglia ever saw or knew of the existence of the pond until the occasion of his death, although the complaint alleges in effect that he had frequently bathed therein (R., p. 7). He was then seen there carrying a gun (R., pp. 45, 70, 72). It is reasonable to presume that he left his home, a mile away, to go shooting, ignorant that the pond existed. It can scarcely be contended, within the rule announced in the Fusselman case, that the pond "lured the injured child there with the result complained of." Certainly it could not be said that if A had a dangerous bomb (assuming that the same constituted an attractive nuisance), in his cellar and a child of tender years in ignorance of its existence gained access to the cellar and was killed by tampering with it, such attraction could be held to have lured the child to his death.

From the foregoing review of the Montana decisions it appears that the highest court of this state has unequivocally adopted the rule restricting the application of the doctrine of "attractive nuisances" and has even gone further in holding that at least with respect

to an infant of the age of eleven years there must be substantial evidence that the child was too young to appreciate the danger and that the attraction in fact lured the child to his death. Herein all of the evidence without contradiction is to the effect that John Troglia was a bright boy, strong and husky, an athlete, runner and fancy swimmer, could read and generally speaking was above the average physically and mentally—certainly not a showing indicative of any incapacity to appreciate the danger of going into the pond in question. Moreover, there is absolutely no evidence that John Troglia was lured to the pond, for so far as the record discloses he never knew that such a pond existed until he was found playing with a gun upon its banks.

An extended examination of modern decisions demonstrates that the rule applicable to what is known as the "turntable cases" finds no application to a case of this kind.

A pond or reservoir is not a dangerous instrumentality within the meaning of the rule as is abundantly and exhaustively shown, both directly and indirectly, by textwriters and the decisions of the courts. Our assertion, of course, is made advisedly upon the record in the instant case. The question here presented is not whether the defendant in error is liable (a) by reason of a trap or pitfall upon his property which may produce death or injury; (b) a hidden or concealed danger; or (c) a dangerous agency in close proximity, or so near a highway that in the use of the highway an accident may occur; but is, whether

this pond of water not shown in any particular to differ from a natural body of water was an attractive nuisance such as must subject the defendant in error to liability for the death of the deceased minor child. It was a pond, artificial admittedly, but to all intents and purposes quite like a natural lake presenting only those dangers that in law are considered to be obvious even to those of tender years.

One of the latest expositions of the modern tendency of courts upon this subject is to be found in 20 Ruling Case Law "Negligence," Section 85, page 96:

> "85. WATERS.—Ponds, pools, lakes, streams, and other waters embody perils that are deemed to be obvious to children of the tenderest years; and as a general proposition no liability attaches to the proprietor by reason of death resulting therefrom to children who have come upon the land to bathe, skate, or play. In a recent case the court said: 'That a pond of water is attractive to boys for the purpose of play, swimming and fishing no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely, or will probably, result in injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams for purposes of play, swimming and fishing is comparatively small. It would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore

comes within the turntable cases. Accordingly, a right of recovery has been denied in the case of children eleven, ten, nine, eight, seven, six, and even five years of age. Although a property owner may know of the habit of children to visit waters upon his premises, he is as a rule under no obligation to erect barriers or take other measures to prevent them being injured thereby. According to some of the decisions, if a pond or pool is in close proximity to the highway, a recovery may be had for the drowning of a young child who has fallen therein; but the weight of authority appears to hold to the contrary, except where the facts bring the case within the rule respecting pitfalls adjacent to highways. And there would seem to be no room to doubt but what a pond on an unfenced city lot, formed by surface water on account of the damming up of a natural drain therefor, by the dumping of trash and dirt into it by city authorities, without the knowledge of the owner, who did not know of the existence of the pond, will not render him liable for the drowning of a boy while playing on the pond. In the case of wells, cisterns, conduits, sluices, and the like, it is very plain that the rules above stated have only a limited application, if any at all. The danger from such places differs from that embodied by ordinary ponds and pools, inasmuch as the peril of the former often is concealed or not to be appreciated by the childish mind. Consequently, while a drowning in a pond does not, ordinarily, give rise to a right of action, it not infrequently has been held that the drowning of a child in a well, cistern,

or the like, constitutes a ground for recovery. And it has been held that where a conduit that easily can be guarded is permitted to remain unprotected with knowledge that children resort to it, a recovery is properly allowed. But recent cases hold that the owner of a mill race about which children are accustomed to play because of its attractive character is not bound to protect it to prevent accidents to the children, and therefore is not liable for the death of a child who falls into it and is drowned."

"c. PONDS, RESERVOIRS OR STREAMS. As to ponds or reservoirs the weight of authority is that they are not to be classed with turntables and that the owner of premises on which a pond or reservoir is situated is under no obligation to keep the premises guarded against the trespass of children. So it has been held that a properly constructed drain, made for the purpose of carrying off surface water, is not such a contrivance as would be so inviting to a child that the owner would be liable for his death by drowning, due to his playing in the drain during or just after a very heavy rain."

29 Cyc., page 464, "c."

Even in many of the states where the "turntable" doctrine is approved, the courts thereof decline to extend the application of the rule to cases involving ponds or reservoirs.

See *Savannah etc.* v. *Beavers* (Ga.), 39 S. E., 82, which was a case of a five-year-old boy drowned in a pool formed in an excavation on the premises of

the defendant; *Stendall* v. *Boyd* (Minn.), 75 N. W., 735, which was a case of a boy not quite five years old, drowned in a quarry on the premises of the defendant; *Moran* v. *Pullman Palace Car Co.* (Mo.), 36 S. W., 659, which was a case of a nine-year-old boy drowned in a quarry filled with water; *Dobbins* v. *Ry. Co.* (Texas), 41 S. W., 62, which was a case of a three-year-old child drowned in a pool of water on a right-of-way of the defendant; *Richards* v. *Connell* (Neb.), 63 N. W., 915, which was a case of a ten-year-old boy drowned in a pond on defendant's premises; *Peters* v. *Bowman* (Cal.), 47 Pac., 113, which was a case of an eleven-year-old boy drowned in a pond of surface water. There are cases which extend the application of the rule to wells, underground conduits and other like bodies of water or streams which by virtue of their construction constitute traps or pitfalls, but we submit that the overwhelming weight of modern authority denies the application of the doctrine of "attractive nuisances" to ponds or reservoirs which to all intents and purposes are similar to natural bodies of water and present none of the characteristics that are concealed, such as for instance, an unguarded well, or the open mouth of a sewer, or conduit into which children might slip or fall, oblivious to the presence of these dangerous instrumentalities.

There is no evidence that there was any latent or hidden danger present other than that which is inseparably connected with any ordinary body of water. It is charged that the water was extremely cold, but

the evidence is that it was "kind of warm" (R., p. 74). There is, we submit, absolutely nothing to be found in the record to justify the contention that its then condition was inherently dangerous or obviously or unusually alluring.

> "The doctrine of responsibility for having on one's premises an inviting or attractive danger to children is confined to cases where the dangerous agency is so *obviously* tempting to children that the owner is guilty of negligence for failing to observe and guard against the temptation and danger."
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> *Tomlinson* v. *Vicksburg S. & R. Ry. Co.* (La.), 79 So., 174.

In the case of *Martin* v. *Northern Pacific Ry. Co.*, 51 Mont., 31, 41, the Supreme Court of the State of Montana discussing the doctrine of implied invitation in a case of an alleged attractive nuisance, says:

> "A swing or rose garden might be peculiarly attractive to children of tender years, but it would overturn every rule of law upon the subject to hold that the owner of private grounds, who maintains exposed thereon either the garden or the swing, by implication invites every child of the community upon his property. Upon the theory of implied invitation—the only one upon which the instruction" (under discussion) "could be applicable at all—it is erroneous in omitting the very essential element of knowledge on the part of the landowner, that the device is *inherently* dangerous, that it is unusually alluring to children of tender years, etc."

Nothing in the record remotely establishes the essential fact that this particular pond was inherently dangerous or that it was obviously or unusually alluring to the deceased son of plaintiff in error.

We have hereinbefore asserted that the overwhelming weight of authority denies the application of the rule of the turntable cases to ponds or reservoirs and we, therefore, are impelled to cite cases in such number as will justify our assertion; and in so doing we take the liberty of quoting therefrom for the purpose of presenting the reasoning of the courts in denying the application of the rule.

In *Zartner* v. *George* (Wis.), 145 N. W., 971, the court in denying the application of the doctrine to a pond, says:

> "The language in Ryan v. Towar, 128 Mich., 470, 55 L. R. A., 310, 92 Am. St. Rep., 481, 87 N. W., 646, is quite suggestive of the necessity of drawing a line limiting liability to trespassers within the bounds of what is reasonable and practical. The court, in commenting upon the case of Kansas C. R. Co. v. Fitzsimmons, 22 Kan., 686, 31 Am. Rep., 203, said: 'Here we have the doctrine of the Turntable Cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawn mower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who

turns in his lot a kicking horse or a cow with calf—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder or a grindstone or a scythe or a plow or a reaper without danger of being called upon to reward trespassing children, whose parents owe, and may be presumed to perform, the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fishpond? And must he guard ravines and precipices upon his land? Such is the evolution of the law, less than thirty years after the decision of Sioux City & P. R. Co. v. Stout, 17 Wall., 656, 21 L. ed., 745, when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon.' To this the court might have added that there is a growing tendency to make everybody responsible for the safety of children except their parents."

In the case of *Thompson* v. *Baltimore & Ohio Railroad Co.* (Pa.), 218 Pennsylvania State, 444, Vol.

11 American & English Annotated Cases, page 899, the court says:

> "Whether an owner of land who makes changes on it in the course of its beneficial use, which tend to attract children and to expose them to danger, is under a duty to take special precautions for their safety, is a question on which there is a conflict of authority. That such a duty exists has been asserted in some jurisdictions and denied in others. The earlier cases on the subject followed Sioux City, etc. R. Co. v. Stout, 17 Wall. (U. S.), 657, but the tendency of the later decisions is decidedly against the imposition of such a duty; some of the courts that adopted the ruling in Sioux City, etc. R. Co. v. Stout, have since repudiated it, and others have followed it with hesitation or have limited its application to a particular class of improvements.
>
> "The establishment of such a duty would create a restraint which in some cases would amount to a prohibition, upon a mode of beneficial use of land, for the protection of intruders and intermeddlers. It is difficult to see any ground upon which such a duty can be placed. An owner is not liable for leaving his land in its natural shape. Why should he be held liable for placing structures upon it which are harmless in themselves and are necessary for the lawful use he wishes to make of it? It cannot be said that he invites or allures children, because no such intention in fact exists, nor that he sets a trap for the innocent and unwary. The law does not impose a duty upon the landowner to take special precautions for a

> class of persons, a doctrine which, if carried to its logical conclusion, would, as was said in Gillespie v. McGowan, 100 Pa. St., 144, 'charge the duty of the protection of children upon every member of the community except their parents.' In Delaware, etc. R. Co. v. Reich, 61 N. J. L., 635, 40 Atl. Rep., 682, it was said by Gummere, J.: 'The viciousness of the reasoning which fixes the liability on the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is unwarranted.' "

In the case of *Erie Railway Co.* v. *Hilt*, 247 U. S., 97, 62 Law Ed., 1003, the Supreme Court of the United States holds:

> "There is no ground for the argument that plaintiff was invited upon the tracks. Temptation is not always invitation. (Citing cases.) In this case, too, the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore, it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away, etc."

We submit that the foregoing is peculiarly applicable herein when it is recalled that it cannot be claimed that John Troglia was lured or attracted by the pond in the absence of any evidence that he had

any knowledge of its existence prior to the time he arrived upon its bank carrying his gun. That there is any evidence of an invitation extended to him we deny.

> "Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are any quantities of surface where they may be injured. To compel the owners of such property either to inclose it or to fill up their ponds and level the surface so that trespassers may not be injured would be an oppressive rule. The rule does not require us to enforce any such principle even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim and climb trees. All of these amusements are attended with danger and accidents frequently occur. It is part of the boy's nature to trespass especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches."
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> *Gillespie* v. *McGowan,* 100 Pennsylvania, 149.

In *Peters* v. *Bowman,* 115 Cal., 345, 47 Pac., 113, it appeared that the defendant permitted a pond to remain on his premises unguarded and unfenced. A boy of eleven while floating on a raft fell off and was drowned. Therein, the court, although it recognized and approved the "turntable cases," said:

> "A body of water—either standing as in ponds or lakes, or running as in rivers and creeks, or

ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall. However, general reasoning on the subject is unnecessary because adjudicated cases have determined the question adversely to appellant's contention. No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation; while it has been repeatedly held that in such a case no damages can be recovered. * * *

"There are streams and pools of water where children may be drowned; there are any quantities of surface where they may be injured. To compel the owners of such property either to inclose it, or to fill up their ponds and level the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is a part of the boy's nature to trespass, especially where there

is tempting fruit; yet I have never heard that it was the duty of the owner of a tree to cut it down because a boy trespasser might possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

In *Ritz v. Wheeling* (W. Va.), 31 S. E., 993, the court said:

"Ought a farmer be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and sue the farmer, on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its tow-path and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? 'A child's will is the wind's will.' Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the

railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie* v. *McGowan,* 100 Pa., 144, 45 Am. Rep., 365, this rule 'would charge the duty of the protection of children upon every member of the community except their parents.' A very onerous duty!"

In *Stendall* v. *Boyd* (Minn.), 75 N. W., 735, the court said:

"The doctrine of the turntable cases is the exception to the rule of non-liability of a land owner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of non-liability as to tresspassers must be abrogated as to children and every owner of the property must at his peril make his premises child-proof. If the owner must guard an artificial pond on his premises so as to prevent injury to children who may be attracted to it, he must on the same principle guard a natural pond; and if the latter, why not a brook or creek, for all water is equally alluring to children? If he fenced in his stone quarry after it fills with water so that children cannot reach it —a well nigh impossible task—why should he not be required to do it before, for a stone quarry with its steep and irregular sides might well be

> an attractive and dangerous place to children? It would seem that there is no middle ground and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery. * * * We are of the opinion that the doctrine of the turntable cases ought not to be applied to this case. With the exception of Pekin v. McMahon, 39 N. E. Rep., 484, the courts of last resort, including those which recognize the doctrine of the turntable cases, have uniformly denied the liability of a land owner for injuries to trespassing children by reason of open and unguarded ponds and excavations upon his premises."

In *Klix* v. *Nieman* (Wis.), 32 N. W., 223, the court says:

> "If the defendant was bound to fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books and it would be most unreasonable to so hold."

In *Thompson* v. *Illinois Central Railroad Co.*, 63 So., 185 (Miss.), which was a case involving the death of a minor in a pond upon the theory that the same constituted an attractive nuisance, the court said:

"Of course, one could have anticipated the possibility of this sad event; but we think the danger was comparatively remote. Scattered over the length and breadth of the land are innumerable ponds and lakes, artificial and natural; and occasionally a boy or man loses his life while wading or bathing in such a body of water. If, as a matter of fact, the owners of fish ponds, mill ponds, gin ponds, and other artificial bodies, wherein it is possible that boys may be drowned, can be held guilty of actionable negligence unless they inclose or guard the same, few will be able to maintain these utilities and to our minds an intolerable condition will be created."

"To say that a property owner must guard against such injury to a trespassing boy, simply because it is possible for him in a venturesome spirit to climb into the zone of danger, would be intolerable. In every dooryard and on every street side are shade and ornamental trees. To climb trees is as natural to the average boy as to a squirrel. Such sport is always attended with danger that the climber may lose his hold or break a branch and fall to his severe injury. Not infrequently it may bring him to an elevation where he is exposed to contact with wires carrying electric currents of greater or less intensity. If he falls and breaks his bones, or if he receives a stunning shock of electricity, ought the owner of the tree to be held liable in damages because he did not guard it against the approach of the lad, or because he did not give notice or warning in some way of the dangers to be apprehended in climbing it? No court has ever gone to such

an extent, and the establishment of such rule would render the ownership of real estate a very undesirable investment."

Anderson v. *Fort Dodge, etc. Ry. Co.* (Ia.), 130 N. W., 391.

"It is a matter of common knowledge that alluring and attractive flumes, such as the one in question in this case, carrying running water are extensively used in this territory not only by miners in the necessary and proper conduct of their business but by farmers in the necessary diversion and application of the public streams to a beneficial use upon their lands in the cultivation of their crops. Not only flumes, but irrigation ditches, large and small, similar in purpose, construction, and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity. There is no distinction that can properly be drawn for liability for injuries received by a child from any of such various means of diversion or use of water. Both as a matter of law and as a matter of public policy, we feel that the so-called 'turntable doctrine' should not be extended to cover such a case as is here presented."

Salladay v. *Old Dominion, etc. Co.* (Ariz.), 100 Pac., 442.

"The pond appears to be of like character, and, although made by the city, is virtually a reproduc-

tion of the ponds found in nature, and nature does not maintain attractive nuisances. That there always is possible danger of a child going upon the ice or falling into the water is true; but such an accident is as likely to occur on any like pond in nature. It has been said that there is possible danger in every step of life from the cradle to the grave, although the danger may not be foreseen. Every tree that stands in the park or in the city presents the possible danger that some boy may climb it and fall to his injury, or even death. Ordinary care requires only that means be taken to avoid such dangers as are reasonably to be apprehended—probable dangers, not possible dangers. The imminence of the danger is ordinarily the measure of care to be taken to avoid it. There seems no reason in this case to hold the city liable which would not have been equally cogent had the boy, in going to or from school, gone through a neighbor's pasture, with the owner's consent, and met a like fate upon a pond therein. We know of no rule that imposes higher care upon a city than upon an individual."

Harper v. *City of Topeka* (Kan.), 139 Pac., 1019.

This case is the latest decision of the Supreme Court of Kansas discovered by us and very clearly overrules earlier Kansas cases relied on by plaintiff in error.

In the case of *Wheeling* v. *Harvey* (Ohio), 83 N. E., 66 annotated, in 19 L. R. A. (N. S.), page 1136, may be found collated many decisions bearing specifically upon the question as to whether ponds or reser-

voirs constitute attractive nuisances. Therein are cited the case of City of Pekin v. McMahon, 39 N. E., 484; Price v. Atchison Water Co., 58 Kan., 551, 50 Pac., 450; Kansas City v. Siese, 71 Kan., 283, 80 Pac., 626; Franks v. Southern Cotton Oil Co., 58 S. E., 960, 12 L. R. A. (N. S.), 468—all of which are cited or discussed in the brief of plaintiff in error. It appears that the Supreme Court of Illinois has repudiated the rule laid down in the City of Pekin v. McMahon. Following the citation of these cases are collated a large number of decisions repudiating the rule and reasoning which sustain the doctrine that a pond or reservoir is an attractive nuisance. And the writer of the annotation observes:

> "In the majority of cases, however, the attempt to extend the attractive nuisance doctrine to the dangers of the class discussed" (namely, ponds or reservoirs) "under this subdivision of the note has been unsuccessful."

We invite the attention of the court to the dissenting opinion in the case of *Kansas City* v. *Siese,* supra, which, following the case of *Price* v. *Atchison Water Co.,* supra, holds that a pond or reservoir constitutes an attractive nuisance.

> "In my judgment the Price case carries the principle of the turntable cases far beyond the danger limit. That if in the future the principle there announced shall be followed, we shall adjudge the owner of an apple tree, from which an adventurous boy shall fall and sustain injury, in

his effort to reach a big, red apple attractively displayed on its branches, guilty of maintaining an attractive nuisance and answerable therefor in damages; or one, for the purpose of affording water for his stock or to run his mill, shall maintain a pond, guilty to the same extent. The claim that cases like the one at bar are governed by the principle of the turntable cases to my mind is against reason and the vast weight of authority." Citing cases.

In the note found on page 200, in Vol. 7, American and English Annotated Cases, it is held:

"In accord with the doctrine of the reported cases the large majority of the decisions including some which recognize the doctrine of the turntable cases deny the liability of the landowner for injuries to trespassing children by reason of open and unguarded ponds and excavations upon his premises." Citing cases.

In the case of *Barnhart* v. *Chicago, Milwaukee & St. Paul* (Wash.), 154 Pac., 441, it is held:

"That a pond caused by flood water collecting in a depression on a railroad company's right-of-way is not an attractive nuisance so as to make the railroad company liable for the death of an eight-year-old boy drowned while playing upon a raft on the pond."

See also:

Schwartz v. *Akron Water Works Co.* (Ohio), 83 N. E., 66;

Capp v. *St. Louis* (Mo.), 158 S. W., 616;

Charvoz v. *Salt Lake City* (Utah), 131 Pac., 901;
Johnson v. *Atlas Supply Co.* (Texas), 183 S. W. 31;
Green v. *Linton,* 27 N. Y. Supp., 891;
Von Almens, Adm'r v. *City of Louisville* (Ky.), 202 S. W., 880;
Ryan v. *Towar* (Mich.), 87 N. W., 644;
Riggle v. *Lens* (Ore.), 142 Pac., 346;
City of Omaha v. *Bowman* (Mo.), 40 L. R. A., 531;
La Grande v. *Wilkesbarre, etc.,* 10 Pennsylvania Sup. Ct., 12;
Missouri K. & T. R. Co. v. *Dobbins,* 40 S. W., 861;
McCabe v. *American Woolen Co.,* 124 Fed., 283; affirmed 132 Fed., 1006;
Arnold v. *St. Louis* (Mo.), 53 S. W., 900;
Dobbins v. *Missouri K. & T. Ry. Co.* (Texas), 38 L. R. A., 573;
City of Rome v. *Cheney* (Ga.), 55 L. R. A., 221.

"A pond is not to be treated as an attractive danger within the meaning of the turntable cases."

Smith v. *Jacob Dold Packing Co.,* 82 Mo. App., 9;
Cooper v. *Overton* (Tenn.), 52 S. W., 183.

"A landowner is not liable to trespassers even when those trespassers are children of tender years, for maintaining upon his land an unfenced or unguarded pond, the existence of which is apparent and well known."

Sullivan v. *Huidekoper*, 27 App. D. C., 154;
Overholt v. *Vieths* (Mo.), 6 S. W., 74;
Charlebois v. *Goebic, etc.* (Mich.), 51 N. W., 812;
Polk v. *Laurel Hill Cemetery Assn.* (Cal.), 174 Pac., 414.

As disclosed by the record the deceased minor son of plaintiff in error resided in Meaderville and went to school in McQueen Addition—points at least a mile away from the pond in question. Consequently, it is not a case of a reservoir immediately adjoining a highway habitually frequented by children. Not only John Troglia, but all of the other boys who frequented the spot for the purpose of swimming resided at points far distant therefrom. Under the circumstances the case of *Hanna, Adm'r* v. *Iowa Central Railway Co.*, 129 Ill. App., 134, finds application:

> "The claim for damages is based upon a doctrine which is broadly stated by counsel for appellant in their brief as follows: 'As a rule, a trespasser cannot recover damages for an injury, suffered while wrongfully on the premises of another; but while this is the general rule, there is also a well recognized exception to it, which permits a child of tender years, when attracted upon the premises of another and there injured, to recover damages.' And it is argued by counsel that in this case the pond where the accident happened 'was so constructed with reference to its depth, location and attractive character as to impose upon defendant in error the duty of so guarding the pond that children of tender years might not

be attracted and allured to the pond, and there come in contact with the danger, or meet the accident which befell plaintiff in error intestate.' This pond did not obtrude itself upon Carl Burch as an attraction and an allurement. It was remote from any street or highway on which he had a right to be or travel; and its allurements and attractions, whatever they may have been, were only presented to those who deliberately and designedly sought them out. Carl Burch could not have come in contact with them except by going nearly or quite a mile and a half from his home. If he took the route that seems generally to have been taken by the boys who went to the pond, he would only reach the swimming hole where the accident occurred by walking more than a third of a mile along and over a network of railway tracks which should have operated as a warning at every stop. A boy who would deliberately brave such dangers for the sake of a swim would hardly be deterred from that pleasure by any ordinary fence or gate.

"It is contended that Carl Burch was a child of such tender years that the attraction and allurement of the pond, remote though it was in point of distance, were irresistible to him on account of his lack of experience and immaturity of mind and judgment. As already stated, he was twelve years and seventeen days old at the time of the accident. Some testimony was introduced showing that his parentage was humble, that he was reared in a home possessng few books and little culture, and that he was behind the average child of his age in his studies. It does not seem to us

that this testimony showed, or even tended to show want of native intelligence. It is a matter of common knowledge that the bookish or scholarly boy is not always the most intelligent, especially in regard to the phenomena and aspects presented by nature.

"In the case of Heimann v. Kinnare, 190 Ill., 156, the court said: 'In American and English Encyclopedia of Law (Vol. 7, 2 ed., 409) it is said there can be no recovery if the injury came from a danger fully apprehended by the infant, and of which he had assumed the risks, having the capacity to comprehend and avoid danger; and if a minor had reached years of discretion and is fully capable of comprehending danger and using sufficient care to avoid it, he may be guilty of contributory negligence as a matter of law.'

"Without referring to the numerous Illinois cases cited by our Supreme Court in support of this doctrine, it will be sufficient to say here that the principle thus laid down seems to us sound and wholesome. There is nothing in this record contravening the legal presumption that Carl Burch, a boy more than twelve years old, had 'the capacity to comprehend and avoid' the danger he incurred in going upon a floating log in water where he had been several times before. Fully comprehending the danger, and not using sufficient care and self-restraint to avoid it, he was 'guilty of contributory negligence, as a matter of law.'

"Appellant complains of some rulings in the court below as to the admissions of testimony. These rulings might have been erroneous, had

it been the duty of appellee to take measures to prevent the boys of Monmouth from going to the pond to swim; but in the absence of any duty to take such measures, the errors, if any there were, worked no harm to appellant.

"We are of opinion that for the two reasons above stated the peremptory instruction of the court below directing the jury to find the defendant not guilty, was properly given.

"The judgment of the lower court is, therefore, affirmed."

Hanna, Adm'r v. *Iowa Central Railway Co.*, **129 Illinois Appellate Court Reports, 134-139.**

It is argued that because the defendant in error erected danger signs near the pond, such act constituted an open admission that the pond was a dangerous instrumentality particularly alluring to minor children (Brief of plaintiff in error, pp. 23-24). Upon the face of the record it was not incumbent upon defendant in error to erect such signs, and the mere gratuitous assumption of a self-imposed duty not required by law does not constitute actionable negligence, if such duty is not performed.

Barney v. *Hannibal & St. Joseph Ry. Co.*, 26 L. R. A., 847.

Opposing counsel cite the cases of *Mason* v. *Northern Pacific Ry. Co.*, 45 Mont., 474, and *Conway* v. *Monidah Trust*, 47 Mont., 269, on the strength of which they contend that the trial court was precluded from granting the motion for a directed verdict herein solely

because John Troglia was eleven years of age; but counsel overlook the fact that under the theory of this case it was incumbent on plaintiff in error to prove that John Troglia was too young to appreciate the danger of going into the pond and that he was, as a matter of fact, lured to his death by the pond in question.

The case of *Mason* v. *Northern Pacific Ry. Co.*, was not brought under the doctrine of attractive nuisances and none of the rules applicable to such an action is involved or discussed therein.

Likewise, the *Conway Case, supra,* was not one involving the rule under discussion. It was brought to recover for injuries sustained by a minor who fell down a shaft unguarded or fenced as required by City Ordinance. It constituted a hidden trap. None of the essentials of pleading or proof in an attractive nuisance case were therein involved or referred to. On the other hand, the case of *Gates* v. *Northern Pacific Ry. Co.*, 37 Mont., 103, *supra,* clearly announces the rule that in such a case as the one at bar, where lack of appreciation of danger due to immaturity is a vital issue, a boy of eleven years of age and shown to be bright, strong and athletic is deemed to possess adequate intelligence to know and appreciate the danger of going into the water. It is not an inflexible rule of law that simply because the record discloses that a boy is eleven years of age, he is to be held as too young to appreciate the danger of going into a pond or tampering with fire.

In the case of *Nicolosi* v. *Clark* (Cal.), 147 Pac., 971, it is held that a boy of ten years of age, not alleged to be deficient in intellect and understanding, will be held as a matter of law chargeable with knowledge that he has no right to take things from an open implement box of a contractor on a street and so be guilty of an unwarranted trespass in so doing, barring right of recovery for injury by dynamite caps so taken.

Mr. Thompson, in his Commentaries on the Law of Negligence, Vol. 1, Section 1051, discussing "accidents ascribed to childish inexperience, indiscretion and misfortune," cites cases wherein he justifies the decisions of courts denying recovery to boys of the age of John Troglia, who were injured as a result of accidents of the character described by him.

A discussion of contributory negligence on the part of John Troglia is beside the mark, until there is, first of all, substantial evidence of negligence on the part of the defendant in error. Of this we assert there is none.

We submit that this is clearly a case which can only be classified as an accident or one due to childish indiscretion on the part of the deceased Troglia. The record discloses that immediately prior to his death he had been in the pond off and on for a period of two hours (R., p. 55), and that he was fond of seeing how long he could stay under water (R., p. 65). It further discloses that he swam from the lower part to the east part and then he shouted for help a couple of times (R., p. 93). The witness Fabatz thought

he was only playing in the water when he was drowning; "that he was only playing when he was calling for help, because the witness knew he was a good swimmer" (R., p. 95). That from prolonged submersion in the pond while engaged in the pastime of seeing how long he could stay under the water, he became exhausted is clear. To hold that under all of the circumstances the defendant in error was guilty of actionable negligence proximately contributing to his untimely end is sustained neither by law, reason nor justice, and we submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

KREMER, SANDERS & KREMER,
Attorneys for Defendant in Error.